The Children's Mercy Hospital *and* Thomas McGregor. Case 17–CA–15742

May 26, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 12, 1992, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.[1] The Respondent and the General Counsel each filed an answering brief to the other's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Thomas Powell. The Respondent argues, inter alia, that, even assuming arguendo that the General Counsel has established a prima facie case, it has demonstrated that Powell would have been discharged for his misconduct absent his union or protected concerted activities. For the reasons that follow, we find merit in the Respondent's exceptions.

The facts are as follows. The Respondent operates a 167-bed children's hospital. The Respondent has a computerized system by which the operations department is notified that certain equipment is due for a weekly, monthly, or semiannual inspection. Planned maintenance work orders are generated by the computer and sent to the operations department at the required intervals. Each work order has a ''closing status'' line in which employees check off ''U,'' ''F,'' or ''C,'' for unfinished, finished, or canceled, respectively. There was uncontradicted testimony that ''U'' is never used because a work order is either finished in the time period designated, or it remains on the shift's clipboard to be subsequently canceled when the work is later completed. Each work order also has large blank spaces in which employees are expected to note needed additional maintenance.

Operating engineers Thomas Powell and Forrest Hayes worked on the second shift, which was from 3 to 11 p.m. On May 21,[4] they received a work order for the semiannual inspection and maintenance of the 16 bathroom exhaust fans in the Parental Care Unit (PCU).[5] Powell and Hayes admitted at the hearing that they checked only 3 or 4 of the fans, rather than all 16, because it started to rain and they were worried about lightning on the roof. At the end of the shift, however, Powell turned in the work order with the following notations: his initials, employee number, and the date; ''1–16—Amps. 1.1—checks made''; a mark through the ''F'' (for finished) blank; a mark through ''2.05,'' which the computer had listed as the estimated hours to finish the work order; and an insertion of ''1 hr'' next to the ''2.05.''

The Respondent's director of engineering, Randall Moberg, credibly testified that on May 22, Operating Engineer Leadman Thomas Thompson told him that there was a work order turned in indicating that the PCU exhaust fans had been checked and that he questioned whether this had actually been done based on his work on another project. Moberg asked Thompson to look at all the fans to see if they were defective. Thompson did so, and found that on some fans the motors would not turn, on some the plugs were bad, and one fan was vibrating badly.

On the basis of Thompson's report, Moberg called Powell into his office on May 22. Moberg showed Powell the work order, and asked him several times if

[1] The General Counsel excepted to the judge's failure to provide narrow cease-and-desist language in his recommended Order and notice to employees. We grant the General Counsel's exceptions, and modify the Order and notice accordingly.

No exceptions were taken to the judge's dismissal of certain 8(a)(1) allegations.

[2] The Respondent contends that the judge improperly allowed the General Counsel to amend the complaint at the hearing. The amendment alleged that the Respondent interrogated its employees about the union activities of other employees in early May 1991, and told its employees that other employees were discharged because of their union activities on May 31, 1991. The amended charge, dated September 18, 1991, alleged, inter alia, that the Respondent had threatened employees with discharge and had created an impression of surveillance in late March and early May 1991.

In finding that the judge properly acted within his discretion in granting the General Counsel's motion to amend the complaint at the hearing, we note first that the amendment was closely related to the timely amended charge, because they both involved the same legal theory and the same section of the Act; they both arose from the same sequence of events; and the Respondent raised the same or similar defenses to both allegations. *Redd-I, Inc*., 290 NLRB 1115 (1988). We further note that the judge informed the Respondent at the hearing that if it needed additional time to prepare its case after presentation by the General Counsel, the judge would entertain such a request; the Respondent subsequently never asked for additional time. Thus, the Respondent has failed to show that it was prejudiced in any way by the judge's granting the General Counsel's motion to amend the complaint.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] All dates are in 1991 unless otherwise indicated.

[5] The PCU contained the children who were the most critically ill, and the parents of these children were provided 24-hour accommodations in the rooms.

the work was complete. Powell replied that it was. Moberg then told Powell that he did not think that was true, because he had some indication that there were fans with some problems. Powell said that it was probably frayed cords, which he was aware of, and Moberg asked if that was all that he found wrong. Powell replied yes, that the rest of the fans were okay. Moberg said that was not a true statement, explaining that some fans had locked rotors and one was vibrating. Powell then indicated that he had not completed looking at all the fans.

On May 23, the Respondent's employee relations manager, Theresa Cromwell, interviewed Powell, with Moberg present. Cromwell asked Powell if he had completed the work order, and he replied that he thought he had turned it in as unfinished. Moberg then gave the original work order (which was marked ''finished'') to Cromwell, and she said to Powell, ''you told Randy Moberg that you completed it, now you're saying that you turned it in as unfinished; explain.'' Powell shrugged.

On May 29, Cromwell and Moberg interviewed Hayes about the work order. Hayes said that he thought the work order was going to be put on hold and completed later, and that the first he knew about the work order being marked complete was on May 22.

After the Hayes interview, Moberg told Cromwell that he thought Powell should be discharged, and she agreed. Powell was then called in and told by Cromwell that he was being discharged for ''falsification of record and misrepresentation of the facts.''

The judge found that the General Counsel established a prima facie case of discrimination against Powell. He also found that Powell falsified the May 21 work order. Applying a *Wright Line* analysis,[6] the judge nonetheless concluded that the Respondent did not meet its burden of showing that it would have discharged Powell for falsifying the work order even absent his union activities. In so concluding, the judge found that the Respondent had a progressive disciplinary system in place that provided for an oral warning, followed by a written warning, followed by a final written warning or suspension, and then involuntary termination. The only exception to this policy was when ''aggravating or extenuating circumstances'' were present.

The Respondent argued that aggravating circumstances were present here because: (1) Powell had previously received oral and written warnings on the topic;[7] (2) Moberg had just reminded the employees of the importance of correctly completing work orders;[8] and (3) Powell had lied during the investigatory process about completing the May 21 work order. The judge rejected all these contentions. Regarding the first argument, the judge stated that it begged the question, because the issue was why Powell was afforded the first two steps of the progressive disciplinary system but not the third. Regarding the second and third arguments, the judge stated that they were not supported by evidence, because Moberg never told Powell during the discharge process that he believed that there were present aggravating circumstances which warranted bypassing the progressive disciplinary system, and Moberg did not testify that such circumstances were a consideration in his decision to discharge Powell. The judge found that the Respondent's ''evidentiary lacuna'' was a tacit admission that there was no valid reason for denying to Powell the benefit of the third step of the progressive disciplinary system, and thus the Respondent's entire defense was reduced to the status of a pretext.

The judge then concluded that, in the context of animus, the failure to afford a known union adherent the benefits of an existing progressive disciplinary system raised a strong inference of discrimination. Finding that inference to be compelling here, the judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Powell.

The Respondent in its exceptions contends that the ''Employee Conduct/Discipline Program'' in the employee handbook is a guideline only, not a progressive disciplinary system.[9] We find that the record is unclear as to whether the ''discipline program'' was just a guideline or was a regularly followed system.[10] Even assuming the ''discipline program'' was regularly followed, however, we find that Powell's misconduct was sufficiently ''aggravating'' to warrant departure from the putative progressive disciplinary system. In this regard, we note that Powell's misconduct consisted of knowingly falsifying work orders and misrepresenting the truth during the investigative process. Although the

[6] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[7] Powell's personnel file included a written ''verbal'' warning dated January 11, 1989, for ''falsifying his work order request'' by not following instructions and not completing the project, and a written warning dated August 1, 1990, for poor performance and multiple occasions of not filling out the logs for the daily equipment checks.

[8] At an engineering department staff meeting on May 9, Moberg, in response to a question from Powell, stated that if additional repair work was needed on equipment being checked for a work order, the work order should indicate that additional repair was needed. Powell's personnel file also contained a document which indicated that on May 15, Moberg told Powell that work orders should be completed before the paperwork was turned in.

[9] In support of this contention, the Respondent refers to the document itself, which provides that all employees are ''at will,'' and that aggravating or extenuating circumstances may warrant what discipline may be taken.

[10] At the hearing, Moberg was not asked about the Respondent's progressive disciplinary system and how he thought that it applied, or did not apply, to Powell's situation.

judge found that Moberg did not use certain magic words with Powell, i.e., Moberg did not tell Powell there were ''aggravating circumstances'' present, we note that Moberg did tell Powell, in his first meeting with him on May 22, that he considered Powell's falsifying a document and misrepresenting facts to him to be a ''serious problem.'' Further, although the judge found that Moberg did not testify that aggravating circumstances were a consideration in his decision to discharge Powell, Moberg did testify that he terminated Powell because Powell had falsified a hospital record, and had misrepresented the facts to Moberg and Cromwell during the investigation of the falsified work order, including stating that he had performed work when in fact he had not done so.[11] Thus, Moberg thought that he could no longer trust Powell to operate a shift. These factors clearly establish aggravating circumstances warranting the bypassing of the steps of the discipline program, and the evidence shows that Moberg relied on these factors in terminating Powell.

Thus, we find that, notwithstanding the General Counsel's establishment of a prima facie case, the Respondent has met its burden under *Wright Line* and demonstrated that it would have discharged Powell in the absence of any protected activity. Accordingly, contrary to the judge, we dismiss that portion of the complaint which alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Powell on May 29.

ORDER

The National Labor Relations Board orders that the Respondent, The Children's Mercy Hospital, Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or other discrimination because they have become or remained members of International Union of Operating Engineers, Local 6 (the Union) or because they have given assistance or support to that labor organization.

(b) Interrogating employees about their union memberships, activities, or desires.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Kansas City, Missouri, copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] Moberg also testified that in deciding to terminate Powell, he considered Powell's personnel file, which contained several warnings as discussed above in fn. 7 and contained a document indicating that Powell had been counseled on May 15, 1991, that work orders should be completed before the paperwork was turned in.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with discharge or other discrimination because they have become or remained members of International Union of Operating Engineers, Local 6 (the Union) or because they have given assistance or support to that labor organization.

WE WILL NOT interrogate employees about their union memberships, activities, or desires.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

THE CHILDREN'S MERCY HOSPITAL

Mary G. Taves, Esq., for the General Counsel.
Jack D. Rowe and *Brian Wooley, Esqs. (Lathrop & Norquist)*, of Kansas City, Missouri, for the Respondent.
Thomas McGregor, pro se.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act (the Act) was tried before me in Mission, Kansas, on January 28–29, 1992. The original charge was filed by Thomas McGregor, an individual, against The Children's Mercy Hospital (the Respondent) on August 2, 1991.[1] The complaint was issued by General Counsel on September 16. The complaint alleges, inter alia, that, in violation of Section 8(a)(3) and (1) of the Act, employee Thomas Powell was terminated by Respondent because of Powell's membership in, or activity on behalf of, the International Union of Operating Engineers Local 6 (the Union). Respondent duly answered the complaint, admitting jurisdiction of this matter before the National Labor Relations Board (the Board), and the status of certain supervisors under Section 2(11) of the Act, but denying the commission of any unfair labor practices as defined by the Act.

On the testimony and exhibits entered at trial, and my observations of the demeanor of the witnesses, and upon consideration of the briefs that have been filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a health care institution engaged in the operation of a hospital that provides inpatient and outpatient professional medical care services at Kansas City, Missouri. In the course and conduct of said business operations, Respondent annually derives gross revenues in excess of $250,000, and it annually purchases and receives at its facility products, goods, and materials valued in excess of $50,000 directly from suppliers located at points outside Missouri.

Therefore, Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent operates a 167-bed children's hospital; it employs about 1700 employees. Involved in this case is Respondent's operations department, the director of which is Carl Palermo. Reporting to Palermo are Don Reilly, director of maintenance, and Randall Moberg, director of engineering. Reporting to Moberg at the time of the events in question were Supervisor William Gabbert and two electricians and seven operating engineers. One of the operating engineers was leadman Thomas Thompson; another was alleged discriminatee Thomas Powell. Powell had been employed by Respondent for 12 years at the time of the events in question.

In 1989, Charging Party Thomas McGregor was employed by Respondent as an operating engineer. McGregor participated in an unsuccessful organizational attempt among the operating engineers that year. McGregor was discharged in 1989; he filed NLRB charges and a state civil suit against Respondent over that discharge. No finding of an unfair labor practice was made pursuant to McGregor's Board charge. On April 9, pursuant to a local court practice, a voluntary, nonbinding, arbitration proceeding was held on McGregor's civil suit against Respondent. (McGregor's state civil action was ultimately dismissed.)

The complaint alleges that, in violation of Section 8(a)(1), Respondent, by Palermo, in late March, created among its employees the impression that their union or concerted activities were under surveillance and threatened employees with discharge if they engaged in union or other protected concerted activities. In support of these allegations, Powell testified that in late March he and Hayes were told by Palermo that McGregor was being given permission to return to the hospital for the purposes of visiting a patient, that they were to report McGregor's whereabouts to security, and that they were not to talk to him. Hayes corroborated this testimony by Powell; however, he placed the instructions earlier in the year. Palermo denied telling any employees not to talk to McGregor when McGregor returned to the hospital, although he acknowledges telling employees to notify security if it appeared that McGregor was doing anything other than visit the patient. I found Powell credible in his testimony, both as to the approximate date, and about what was said.

In April, electrician Clyde Bowman secured union authorization cards and began distributing them in a second organizational attempt by some of the operations department employees. Bowman, a day-shift operating engineer, gave four of the cards to alleged discriminatee Powell for distribution to employees on the 3 to 11 p.m. shift, the shift on which Powell usually worked. Powell testified that he signed one of these cards, and he distributed the other cards to other employees. Powell further testified that he attended two meetings held by the Union.

Powell, a 12-year employee, was one of two second-shift operating engineers. The other was Forrest Hayes. Hayes, who was still employed at time of trial, testified that about 2 weeks before Powell was discharged on May 29 he met Palermo in the hospital cafeteria. Hayes started a conversation by stating that ''this'' (unspecified) was the worst he had seen things for engineers in 10 years. Palermo asked Hayes to go to Palermo's office. When the men got there, Hayes told Palermo that he was having problems at home and ''there was union problems.'' According to Hayes:

> First of all, [Palermo] told me that he had a list of names that were [given] to him by some anonymous telephone caller and that he knew who all was involved and he told me that I should not worry about what the other people were doing, I should worry about what I was doing, that I would be taking that walk to Personnel and he'd be shaking his head that there was nothing he could do for me. . . . And the conversation went on a little bit more and at that time, toward the end of the conversation, Carl Palermo asked me—I feel bad about it—and he asked me who the key people were in this organizing and at that time I told him that the two key people were the two people with the most seniority in our department, being Tom Powell and Clyde Bowman.

[1] All dates are in 1991 unless otherwise indicated. Some punctuation of long quotations is supplied.

> And at the end of this conversation, Carl Palermo told me that, if I discussed this with anybody, he would find out about it and it would be my ass.

Palermo flatly denied any such conversation with Hayes.

Hayes gave three affidavits to the NLRB field examiners, two shortly after the charge was filed, and one just before trial. In the first two affidavits, he does not mention this exchange with Palermo. Hayes testified that he told the field examiner about the conversation when he was giving the affidavit, but he asked the field examiner to leave it out because he was afraid of reprisal by Palermo. Hayes further testified that he finally came forward with his testimony on this point because he was feeling guilty about informing management about who the initial organizers were and about the fact that one of them, Powell, had been discharged. Hayes further testified that part of his fear of reprisal came from the fact that, just prior to McGregor's April 9 arbitration, when he informed Palermo that he had been subpoenaed to testify in that proceeding, Palermo told him to claim that he (Hayes) could not remember anything.

Palermo testified that, before the McGregor arbitration, Powell and Hayes came to him and stated that they had been subpoenaed to testify for McGregor, but that they did not wish to. Palermo further testified that he told Powell and Hayes only that they were required to go to the arbitration, testify, and tell the truth.

I do not believe that Hayes was reluctant to testify for McGregor at the April 9 arbitration; and, certainly, Powell was not. Hayes was credible in his testimony about Palermo's instruction to claim forgetfulness at the arbitration. Such instruction, I further find, would reasonably engender the fear expressed by Hayes, and I do not find that Hayes has effectively been impeached because he left the above-quoted remarks by Palermo out of his first two affidavits.

Even without the expressions of fear posited by Hayes, the Board recognizes that employees who testify against their current employers do so at their peril, a peril which is not always effectively eliminated by the proscriptions of Section 8(a)(4). Accordingly, the Board affords a presumption of credibility to the testimony of currently employed employees who testify against their employers. *Georgia Rug Mill*, 131 NLRB 1304 (1961).

I invoke this presumption in this case and, for that reason and because Hayes had a more credible demeanor, I find that the remarks attributed to Palermo by Hayes were, in fact, made by Palermo.

Discharge of Powell

Respondent has established a system by which it conducts regular checks of, and performs certain routine maintenance on, the heating, air-conditioning, and other mechanical equipment at the hospital. Different equipment is checked at different intervals. Some equipment is checked daily, and equipment ''logs'' are maintained at each such piece of equipment. After each daily inspection, operations department employees complete entries on these logs.

Other equipment is checked weekly, some monthly, and some semiannually. Respondent has a computerized system by which the operations department supervisors and employees are notified that a piece of equipment is due for a weekly, a monthly, or a semiannual inspection. Planned maintenance work orders (PMs) are forms that are generated by computer and sent to the operations department in various numbers at the required intervals.

Each planned maintenance work order is printed on standard (8-1/2 by 11 inch) paper. When a planned maintenance work order is sent to the operations department, it contains, inter alia, a work order number; the date the planned maintenance work order was printed out; the week of the year that the work is to be performed; the date that the planned maintenance work order is issued; the equipment that is to receive the routine inspection and/or maintenance; the location of the equipment; the routine inspection and/or maintenance that is to be performed on the equipment; and an estimate of the amount of time that will be required for the maintenance or inspection. Each planned maintenance work order further has large blank spaces in which employees describe what action they took. In this space employees are expected to make other appropriate notations, including needed additional maintenance.[2] Each planned maintenance work order has spaces designated ''out'' and ''in'' blanks for entry of the date that the required work is performed. Each planned maintenance work order has a ''Closing Status'' line which has blanks for the employees to check off ''U,'' ''F,'' or ''C,'' for unfinished, finished, or canceled. Finally, there is an area that the employee is to place his employee number and his initials.

When the planned maintenance work orders are received in the engineering department, Supervisor Bill Gabbert divides them up by placing them on clipboards which are designated for the first, second, and third shifts. Operating engineers on each shift get to the planned maintenance work orders after they have attended to other, more urgent, assignments and the inspections that are to be conducted daily. After performance of the work called for by the planned maintenance work order, the employees complete the document and submit them to departmental supervision. The supervisors review the completed planned maintenance work orders and return them to the computer department so that there is a record that the planned maintenance and/or inspection has, in fact, been performed.

If a shift's employees fail to get to a planned maintenance work order in the designated time period, the order stays on the department's clipboard until they do. If an inspection function is called for, say, weekly, and no one gets to the assignment during a given week, another planned maintenance work order is generated during the next week. When the work is performed, an ''F'' is marked on that second order, and ''C'' is marked on the older planned maintenance work order. Then both forms are turned in to supervision (Gabbert). Moberg testified, without contradiction, that the ''U'' (for unfinished) is never used because a planned maintenance work order is either finished in the time period originally designated, or it remains on the shift's clipboard to be subsequently canceled when the work is completed in a subsequent time period.

One wing of the hospital is designated the parental care unit (PCU). The children who are patients in this wing are the most critically ill, and parents are provided 24-hour ac-

[2] For the reasons discussed infra, I discredit Powell's testimony that it was optional with the employee whether to make such notations on the face of the planned maintenance work orders.

commodations in the rooms. Each bathroom in the PCU has an exhaust fan, the motor of which is at the vent on the roof of the wing. These fans, 16 in number, are scheduled for semiannual inspections under the planned maintenance program.

On May 21 Powell and Hayes worked their usual 3–11 p.m. shift. A planned maintenance work order that was on the shift's clipboard called for the semiannual planned inspection and maintenance of the PCU bathroom exhaust fans. The worked called for was:

> Direct drive fan—check for lubrication—grease, if required or oil. Check motor mounts and tighten. Take AMP reading[s] and log on work order.

The amperage of each motor on the fans is supposed to be 1.1.

At the end of the May 21 shift, Powell turned in the planned maintenance work order after he had written, as he admits, his initials, his employee number, the date, and: ''1–16—Amps 1.1 checks made.'' Powell and Hayes admit that they did not check all the fans. They testified that they started checking the fans, but it started raining, and they were worried about lightening, so they left the roof after checking only three or four of the fans. According to Powell on direct examination:

> Well, like I said, Forrest and I checked about four or five of them and we pulled off the roof and later on that afternoon, when we were filling out our logs and filling out our PM sheets, Forrest handed me, you know, a handful and he took a handful and I filled out the PM on the exhaust fans ''1 through 16, 1 amp.'' That means the motors in those fans are 1 amp. And I wrote ''checks made.'' I signed my—I think I signed my name to it. I left the finished mark open and I also did not write the amount of time that we had spent because I told Forrest that him or myself would give a verbal report the next day and explain that there was bad wiring and bad plugs on the fans that we had checked.

Received in evidence as Respondent's Exhibit 23 was the original of the planned maintenance work order in question. On the face of the document, in addition to the computer-generated type and the marks that Powell admits making, are: (1) a mark through the ''F'' (for finished) blank; (2) a mark through ''2.05'' which the computer had listed as the estimated hours to finish the work order; and (3) an insertion of ''1 hr'' next to the ''2.05.'' The defense is that Powell was discharged solely for making these three marks.

Of course, General Counsel has the burden of proof on this issue, like all other issues of fact. Neither General Counsel, nor Respondent, called a handwriting expert to testify on the issue; therefore, it was left to the me, unaided, to determine whether Powell had made all the marks that are attributed to him. As I stated at trial, the marks made on the document are clearly identical in style and nature to other, admitted, samples by Powell. Because of this, and because of the credible testimony by Respondent's witnesses and other circumstances described as this narrative progresses, I find that Powell made all the marks in question.

Hayes, testified on direct examination:

> I recall at the end of that shift that we were both sitting downstairs and I had the PMs in my hand and I recall giving Tom Powell half of those PMs . . . and I took the other half. . . . And then he signed his off and I signed mine off on the ones that we did on the [other] side of the building and then I took those PMs and put them into the—what we call the Billy-gram box.[3]

In other words, after Hayes and Powell did their work for the shift, they split up the planned maintenance work orders that their shift had been assigned, and they signed them off, one way or another. The group that Powell signed off, one way or another, included Respondent's Exhibit 23.

When Powell arrived for his 3–11 p.m. shift on May 22, leadman Thompson told him that Moberg wanted to see him. Powell was asked and testified:

> Q. All right. Explain what—Outline the conversation in Mr. Moberg's office.
>
> A. Okay. I sat down and [Moberg] said to me that Tom Thompson had brought him a suspicious looking work order and I think Randy handed it [R. Exh. 23] to me and he asked me if I had done the work order. . . . I said that I had done the work order. He then said, ''Did you finish it,'' and I said, ''No.'' I told him at that time that I had not crossed out the finished box and I also had not wrote the hours in and I think he asked me if I had checked all the fans and I—initially, I said, ''Yes,'' and then I said, ''No.'' [I said that] I had not checked all the fans, that I only had checked four or five of the fans; and he asked me if I had found any problems and I told him that I was going to give a verbal report on the state of these fans, that I had found bad wiring and also bad plugs on the four or five fans that Forrest and I had checked and I explained that it was late in the after—late in the night and that it was raining and that we were approaching water, most of the other fans, you know, had water around them and that we had pulled off because of weather conditions and conditions that we couldn't, you know, go ahead with the work order. . . . Randy said that he would have to take this matter to [Employee Relations Manager] Theresa Cromwell.

The next day, May 24, when Powell reported to work, Moberg escorted him to Cromwell's office. According to Powell:

> I also told Theresa that I had not checked the finished mark off, nor did I write the hours in, and she asked Randy Moberg what he, you know, what he thought about that and Randy responded, ''This is only a surviving tactic.'' . . . I just told her that I was going to give a oral report, stating that the four or five fans that we had checked had electrical problems. . . . She just said okay, that she would get back to me on her findings.

[3] The employees called written communications to and from Supervisor William ''Billy'' Gabbert ''Billy-grams.''

Powell's next work day (after a holiday) was May 29. Powell testified that on his arrival at work, Moberg again escorted him to Cromwell's office and:

> Theresa told me that my employment at Children's Mercy Hospital was being terminated for falsifying hospital records and breaking the hospital's trust.

On cross-examination, Powell was quite evasive on many points. He had to be asked many times whether he had been told to place on planned maintenance work orders any repair needs that he had noticed while doing the required routine inspection/maintenance functions. The fourth and fifth attempts to get responsive answers resulted in:

> Q. My question is, were you told to put them in writing? A. You had the option of writing that or a verbal report.
>
> JUDGE EVANS: But did anyone specifically tell you that you should put it in writing on the planned maintenance work order after you found something that needed some follow up? Were you ever told, hey, pal, put that in writing when you found something like that?
>
> THE WITNESS: I think—I think that was said.

More evasiveness came when, on cross-examination, Powell was asked if, within the 2 weeks before his discharge, Moberg told the operating engineers ''that planned maintenance work orders had to be completed before the paperwork was turned in?'' Powell launched into a long, disjointed, evasive, narrative that included something about an incident with an air-handling unit and a conclusionary statement that ''it was up to the operator's discretion'' whether to complete the planned maintenance work order before turning it in. Powell was brought back to the subject of what Moberg had told the operating engineers 2 weeks before the discharge:

> Q. But do you recall the discussion with Mr. Moberg?
>
> A. Yes, I do.
>
> Q. And he did advise you that planned maintenance work orders had to be completed before the paperwork was turned in?
>
> A. Or noted.

Further on cross-examination, Powell was asked to repeat his testimony about what he had, and had not, placed on the planned maintenance work order in question. That line of interrogation concluded with:

> Q. And you did not, you're saying, put the hour on there?
>
> A. That's right. I left this work order—When I put it in the box after discussing it with Forrest Hayes, I said, ''what do you want to do about this, Forrest?'' I said, ''I'm going to leave this thing open and we'll give a verbal report in the morning.'' I said, ''you or I can tell them that we found bad plugs and bad wiring on the four or five fans that we checked.'' And I placed this [R. Exh. 23] in the box.[4]

In his direct examination, Powell had not testified that he told Hayes that he was leaving any part of the document blank. Hayes did not testify that Powell had said anything on May 21 about leaving any part of the document blank.

Finally on cross-examination, Powell was referred again to the marks on Respondent's Exhibit 23 that he admits that he did make:

> Q. What did you mean by this term ''checks made''?
>
> A. Just that I had made some checks that I, you know, what I should have done is wrote four or five fans, but I just—I made checks, that I was up there and I did look at some of the fans.

In other words, after all of his exercises in evasiveness, Powell admitted at trial that he entered some of the handwriting on Respondent's Exhibit 23, that those entries were false, and that he should not have made those false entries.

Moberg testified that on May 22:

> Tom Thompson came into my office and said there was a PM turned in indicating the PC exhaust fans had been completed. He was questioning whether or not that work had actually been done based on some investigation that he had been doing for me of mapping out the locations of all the exhaust fans and getting those into the computer properly. It was a different work order that I had given to him. Various engineers had told me that the counts or the locations may not be right on PMs and I asked that be corrected. So, when he told me that, I said, ''Go up and spot-check a couple; tell me if they're still defective.'' And he did that and came back and said, ''Yes.'' I said, ''Okay, go back again, map all of them up there; look at them and see if there's something defective with them; and report that back to me.'' So he did that. He brought me a list that showed some rotors that were locked on motors—meaning that the motor would not turn—some plugs that were bad. I believe there was one fan that was vibrating real bad.[5]

Moberg testified that it was on the basis of this report that he called Powell into his office for discussion of the matter on May 22.

On May 22, when Powell was called to Moberg's office. According to Moberg:

> I had the PM work order with me at that point and I showed the work order to Tom and I said, ''Is this work complete?'' And he indicated that it was complete. . . . [He said,] ''I did that work order.'' I said, ''Is it all done?'' He said, ''Yes''; and I questioned him even so far as he had filled it out and he said,

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[4] After Powell gave this answer, I observed that he and Hayes were not scheduled to come back to work until May 22 at 3 p.m., and I asked:

> JUDGE EVANS: So why did you say you'd give the oral report in the morning?
>
> THE WITNESS: Well, it's my morning. When I come in at three o'clock, it's my morning.

Hayes never used the term ''morning'' to refer to the beginning of the 3 p.m. shift, except once when responding affirmatively to a lead by the General Counsel. This was just another exercise in evasiveness by Powell.

[5] This account of how Powell's misconduct was discovered is not contested by General Counsel. Cf. *Kidde, Inc.*, 294 NLRB 840 (1989).

> ''Yes, I filled out that work order; that's my work order; I did the work.'' He was really very adamant that he had done that work. And so I said, ''Tom, I just—I don't think that's the truth; I have some indication in front of me that shows that there are fans up there with some problems to [sic] them.'' He said, ''Yeah, it's probably frayed cords and I was aware of that.'' And I said, ''Is that all that you found wrong?'' And he said, ''Yeah, that's—the rest of them are okay.'' I said, again, ''That's not a true statement.'' I started explaining to him that there were some of them with locked rotors, that there was one that was vibrating. And he . . . did indicate to me that he had not completed looking at all of the work orders.

Thompson, who was present, testified consistently with Moberg, and I found them both to be more credible than Powell about what happened in the May 22 conference.

Moberg described the May 23 interview of Powell by Cromwell:

> [Cromwell] asked [Powell] if he had completed the work order and he told her in that meeting that he thought that he had turned it in as unfinished; and so at that point I went back to our record books that contain the originals and got out the original and went back to Theresa Cromwell's office and gave it to her and she showed it to Tom and said,''you told Randy Moberg that you completed it, now you're saying that you turned it in as unfinished; explain.'' And . . . I think he shrugged his shoulders.

Cromwell testified consistently with Moberg, and I found them both to be more credible than Powell in testifying about the May 23 interview in Cromwell's office.

Moberg testified that he and Cromwell interviewed Hayes on May 29, before Powell's discharge on that date. In that interview, according to Moberg, Hayes stated that he had been on the roof with Powell, that he suggested leaving the roof before the work order was completed, and that ''he had thought that the work order was going to be put on hold and completed at a later date and that the first that he had learned about the completed work order, or it being [marked] complete when it wasn't, was on [May 22].'' Hayes was not called in rebuttal to deny this testimony, and I found Moberg credible at this point.

Moberg testified that after the Hayes interview was completed, he told Cromwell that he thought Powell should be fired. Cromwell agreed. Powell was called in and told by Cromwell that he was discharged for ''[f]alsification of record and misrepresentation of the facts.''

Moberg testified that after the discharge interview in Cromwell's office:

> I went with Tom Powell back to his locker so that he could get his personal belongings out of his locker and we got there and he opened up his locker and there was nothing in it. I was a little shocked at that and asked him why it was empty and he said, well, he just—he thought he was going to be terminated and so he'd gone ahead and cleaned it out prior to that. So we went ahead and went to an elevator and I proceeded to walk with him out to his vehicle. As we were exiting the hospital, he made a statement to me. He said, ''I made a mistake and I'm paying the ultimate price,'' and I did not respond to him. I just escorted him on out to his pickup truck and went back in the building.

Powell denied making the ''ultimate price'' statement, but I found Moberg credible. I further credit Moberg's testimony that, at no time during the investigation/discharge process did Powell state that he had planned to make a ''verbal report'' on the repairs that the fans needed.

After Powell's Discharge

Hayes testified that ''approximately one or two days after'' Powell's termination on May 29:

> I was getting ready to leave the engineering office and go through the back part of it and Carl [Palermo] was coming through that office and at that time he turned around and closed the back door and he asked me how it was going and I said it was okay and the next thing I know Carl told me, he goes, ''Forrest, there's one more individual to go and you know who that individual is.'' And he looked toward the electrical department because it was south, south of our office, and I knew who he was talking about. Hayes testified that he ''knew'' that Palermo was referring to electrician Clyde Bowman whom Hayes had previously identified to Palermo as one of the two principal employee organizers. Palermo denied any such conversation; however, again, because of the reasons that I have previously stated, I found Hayes credible.

Evidence of Discriminatory Treatment

General Counsel offered employee testimony that, in years past, employees had been instructed to complete planned maintenance work orders, and mark them off as finished, when the work had not actually been done. This testimony was probative of nothing. Each case described was when the supervisor had found a great backlog, a circumstance not present here. Moreover, the then supervisors told the employees, in effect, that such a practice was not something that should have been done. Finally, the supervisor involved here was Moberg. Moberg was not involved in the prior aberrations (if, in fact, they occurred); and Moberg had told the employees only 2 weeks before Powell's discharge (regardless of what had happened before) that all planned maintenance work orders were to be completed accurately before being turned in to supervision. By Powell's own testimony, it has been proved that Powell did not complete Respondent's Exhibit 23 before he turned it in; also, partly by his own testimony, it has been proved that Powell entered false information on the document.

General Counsel also introduced into evidence a section of Respondent's employee handbook entitled ''Employee Conduct/Discipline Program.'' Listed as part of its ''minimum'' requirements of employee conduct is ''Providing clear and accurate information in all written and verbal communications.'' At the conclusion of the listing of the employee conduct rules there follows (emphasis is original):

> DISCIPLINARY ACTION WILL OCCUR IF ANY OR ALL OF THE ABOVE GUIDELINES ARE NOT

> MET. For an employee who has completed his/her introductory period in a full-time or part-time position,[6] four types of disciplinary action are generally *utilized.*
>
> *Oral Warning*: Allows an employee the opportunity for self- discipline and correction.
>
> *Written Warning*: Emphasizes the importance of the offense and the necessity of a plan for improvement.
>
> *Final Written Warning or Suspension*: Communicates the seriousness of the offense and emphasizes that future incidents will subject the employee to termination.
>
> *Involuntary Termination*: Occurs when hospital management believes that continued employment is not in the best interest of the Hospital, other employees, patients, and visitors.
>
> . . . .
>
> Absent aggravating or extenuating circumstances, disciplinary action for a violation of the above standards will normally start with an oral warning followed by written warning, final written warning/suspension, and involuntary termination for subsequent offenses.

On January 11, 1989, Gabbert issued to Powell a written ''verbal'' warning for, inter alia, ''falsifying his work order request.'' As the ''improvement action'' the Gabbert's warning states: ''Work will be monitored more closely—and work orders will be completed in more detail.'' On August 1, 1990, Moberg issued to Powell a ''Written Warning'' for poor performance and multiple occasions of not filling out the logs for the daily equipment checks. As ''Plan for Improvement,'' Moberg states: ''Tom Powell will correctly fill out all logs and log book entries. Tom will also operate his shift as per instructions both written and verbal.[7]

Moberg testified, repeatedly, that the decision to discharge Powell was made solely by him (and that Cromwell only concurred). Moberg was not asked about Respondent's progressive disciplinary system and how he believed that it applied, or did not apply, to Powell's case. Specifically, Moberg was not asked, and he did not testify, that there were circumstances in the case of Powell's falsification of the May 21 planned maintenance work order that he considered to be ''aggravating.''

To show that Powell was treated as any other employee would have been under the circumstances, Respondent introduced documentation that two probationary employees who had falsified their employment applications had been summarily discharged for that reason. Respondent also introduced evidence that, subsequent to Powell's discharge, another employee was discharged for false statements to another business entity about something that had occurred at the hospital.

[6] As noted, Powell had been employed for 12 years.

[7] During the investigation of the 1990 offenses covered by the written warning, Powell submitted a reply which included the false statement that he had been working 6 and 7-day weeks. This factor further detracts from Powell's credibility.

B. *Analysis and Conclusions*

1. Alleged violations of Section 8(a)(1) of the Act

Even as credited, the testimony by Powell and Hayes that Palermo told them not to talk to Charging Party McGregor, a nonemployee, when McGregor visited the hospital did not violate the Act. The testimony advanced by General Counsel is far from clear that a reasonable employee would have concluded that the instruction in any way related to union or protected concerted activities. Accordingly, I shall recommend dismissal of this allegation of the complaint.[8]

As stated by Administrative Law Judge Shapiro in *California Dental Care*, 272 NLRB 1153, 1165 (1984):

> In determining whether an employer created the impression of surveillance the test applied by the Board is whether, under the circumstances, the employee would reasonably assume from the statement in question that the employee's union activities had been placed under surveillance.

Palermo's mid-May statement to Hayes that he had received an anonymous telephone call and knew who was ''involved'' in the union activity could not have been coercive under the circumstances. In the first place, Palermo made no suggestion that he had engaged in surveillance (or even legal observations). Second, Palermo gave an identification of his ''source,'' albeit a vague one.[9] Under the circumstances, no reasonable employee would have concluded that surveillance had been conducted.

Accordingly, I find and conclude that by Palermo's statement that Respondent had received an anonymous telephone call in which identities of union adherents were learned, Respondent did not violate Section 8(a)(1) of the Act.[10]

However, in the same conversation, Palermo issued two separate threats of discharge, or other discrimination, to Hayes. He threatened to discharge Hayes if Hayes got involved in what ''the other people were doing,'' and he threatened to discharge Hayes if he told others of their conversation. What the other people were doing was union or protected concerted activities, and the first threat was obviously violative. By the second threat, Palermo was then imposing a condition of employment on Hayes, an illegal one. Hayes had just as much right to discuss the conversation with other employees (and the Board) as he did to discuss his wages or any other condition of his employment.[11]

Accordingly, I find and conclude that by both of Palermo's threats toward Hayes, Respondent violated Section 8(a)(1) of the Act.

Of course, Palermo's asking Hayes to name the ''key people'' who were involved in the union activity was an interrogation in violation of Section 8(a)(1) of the Act, as I further find and conclude.

[8] See *Gem Urethane Corp.*, 284 NLRB 1349 at 1363–1364 (1987).

[9] See *Tartan Marine Co.*, 247 NLRB 646 (1980), in which the employee was told that the supervisor heard of the union activity ''some people in a bar.''

[10] *Checker Cab Co.*, 247 NLRB 85 (1980).

[11] *Jeanette Corp.*, 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3d Cir. 1975).

Finally, 2 days after Powell was discharged, Palermo told Hayes that there was ''one more individual to go'' and made a nodding reference to the workplace of the other employee-organizer, electrician Bowman. This was a threat that Respondent would look for a reason to discharge Bowman, even if Powell had been discharged lawfully. The only possible basis for the threat was the information that Palermo had received in his preceding conversation with Hayes—that Bowman was one of the two employees who was exercising the employees' Section 7 right to engage in union and union or protected concerted activities.

Accordingly, I find and conclude that by this remark of Palermo, Respondent violated Section 8(a)(1) of the Act.

2. Alleged violation of Section 8(a)(3)

The complaint alleges that Powell was discharged because of his union activities; Respondent contends that Powell was discharged for falsifying a document, to wit, the planned maintenance work order that Powell submitted on May 21.

The law is that the General Counsel has initial burden of establishing a prima facie case sufficient to support an inference that union or other concerted activity that is protected by the Act was a motivating factor in Respondent's action that is alleged to constitute discrimination in violation of Section 8(a)(3) or (1). Once this is established, the burden shifts to Respondent to come forward with evidence that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, General Counsel ''is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee's protected activities.'' *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). ''For a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.'' *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). If a pretext has been advanced, the inference of unlawful motivation is logically reinforced.[12]

To meet its burden under *Wright Line*, it is not enough for an employer to show that an employee, for whom General Counsel has presented a prima facie case of discrimination, engaged in misconduct for which the employee *could have* been discharged, or otherwise disciplined. The Respondent must show that it *would have* discharged, or otherwise disciplined, the employee for the misconduct in question. *Hrasco Corp*., 304 NLRB 729 (1991).

Therefore, the first inquiry is whether the record contains a prima facie case of discrimination, or credible evidence that Respondent knew or suspected that the alleged discriminatee had engaged in union or other protected concerted activity, and that Respondent's decision to discharge the employee was motivated, at least in part, by animus toward that activity. *Chelsea Homes*, 298 NLRB 813 (1990). If such a prima facie case is held to have been established, an inquiry will be made whether the defense has been rebutted, either by showing that it is without factual basis or by a showing that it is pretextual.

I have found that Hayes was threatened and interrogated by Palermo before Powell's discharge and that Palermo threatened to discharge Bowman afterward. Therefore, General Counsel has demonstrated Respondent's animus toward its employees' union activities.

General Counsel has also proved Respondent's knowledge of Powell's union activities. The product of Palermo's interrogation of Hayes was the identification of Powell as one of the two employee-organizers. In an attempt to quarantine the evidence of Palermo's knowledge, Respondent introduced testimony by Palermo that he did not involve himself with discharge decisions, even though he is head of the operations department (and, according to this record, none other). Additionally, Moberg was presented to testify that he knew nothing of Powell's union activities, and that he, and only he, made the decision to discharge Powell. I do not believe any of that testimony.

Moberg is not the lowest-level supervisor in the operations department, but he is the next thing to it. I simply do not believe that Palermo did not involve himself in a decision to discharge an employee who had been in his department for 12 years. But, even if Moberg was the only supervisor involved in the decision. Palermo's actual knowledge is properly imputed to Moberg.[13] (And such knowledge would be equally imputable to Cromwell whose participation was obviously more than a matter of form, as Respondent contends.)

Accordingly, I conclude that, with this evidence of knowledge and animus, a prima facie case of discrimination against Powell has been presented by General Counsel.

Powell falsified the May 21 planned maintenance work order. The issue is: Would Respondent have discharged Powell for having done so, even absent his union or protected concerted activities?

At the time of Powell's discharge, there was in effect for Respondent's employees a progressive disciplinary system that provided for a ''final warning'' with suspension that ''[c]ommunicates the seriousness of the offense and emphasizes that future incidents will subject the employee to termination.'' If this written promise to employees means anything, it means that the seriousness of an infraction will be impressed on an employee by a suspension, with attendant loss of pay, before the ''ultimate price'' (Powell's words) would be paid.[14] The only exception to Respondent's promise to provide penultimate punishment is the case in which there is present ''aggravating . . . circumstances.''

On brief, Respondent argues that aggravating circumstances were present because: (1) Powell had previously received oral and written warnings on the topic; (2) Moberg had just reminded the employees of the importance of completing planned maintenance work orders, and completing them correctly; and (3) Powell lied during the investigatory

[12] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

[13] *Board Ford, Inc*., 222 NLRB 922 (1976); *Bartenders Local 19*, 240 NLRB 240 (1979), and cases cited infra at 246.

[14] The ultimate issue being, of course, whether the ''ultimate price'' was imposed lawfully.

process about completing the May 21 planned maintenance work order.

The first reason advanced for finding aggravating circumstances begs the question; the issue is: why was Powell afforded the first two steps of the progressive disciplinary system but denied the third? The second and third reasons advanced by Respondent would give more pause if they were supported by evidence. Moberg did not tell Powell during the discharge process that he believed that there were present aggravating circumstances which deprived the employee of the protection of all of the steps of the progressive disciplinary system; and Moberg did not testify that, even though he did not mention it to Powell, such circumstances were a consideration in ''his'' decision to discharge Powell.[15]

Therefore, in the posture of this case, the argument that the progressive disciplinary system was not afforded to Powell because of aggravating circumstances is nothing more than an argument that Powell *could have* been discharged for his misconduct, not that he *would have* been discharged for his misconduct even absent his union or protected concerted activities.[16] Respondent's evidentiary lacuna is a tacit admission that there was no valid reason for denying to Powell the benefit of the third step of the progressive disciplinary system. Because of this failure of evidence, the its entire defense is reduced to the status of a pretext.

In a context of animus, the failure to afford a known union adherent the benefits of an existing progressive disciplinary system raises a strong inference of violative discrimination.[17] I find that inference to be compelling here,[18] and I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Powell on May 29.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employee Thomas Powell, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[15] As noted, I do not believe Moberg's testimony that he, alone, made the decision to discharge Powell.

[16] *Hrasco Corp*., supra.

[17] *Transportation Enterprises*, 240 NLRB 551, 550 (1979).

[18] Certainly, neither Respondent's evidence that it had discharged two probationary employees for falsifying their employment applications, nor its evidence that it discharged another nonprobationary employee for documentfalsification after it discharged Powell, rebuts the inference.